Before the FEDERAL COMMUNICATIONS COMMISSION Washington, D.C. 20554

In the Matter of)	
Applications of Sprint Nextel Corporation, Transferor))	WT Docket No. 12-343
SoftBank Corp., and Starburst II, Inc., Transferees)	
Joint Applications for Consent to Transfer of)	
Control of Licenses, Leases, and)	
Authorizations; and Petition for Declaratory)	
Ruling under Section 310(b)(4) of the)	
Communications Act of 1934, as amended)	

COMMENTS OF VERIZON WIRELESS

Cellco Partnership d/b/a Verizon Wireless takes no position on the merits of the above-captioned applications, which seek consent for SoftBank Corp. to acquire control of Sprint Nextel Corporation and for Sprint to acquire *de facto* control of Clearwire Corporation, resulting in SoftBank's indirect control of Clearwire. As part of its competitive review of this transaction, however, the Commission must consider Clearwire's significant Broadband Radio Service ("BRS") and Educational Broadband Service ("EBS") spectrum holdings. The Applicants themselves tout the value of this spectrum as a primary benefit of the transaction; it would be arbitrary for the Commission to discount spectrum that is indisputably "suitable and available" for mobile services, and highly valued in the market.

To determine whether a proposed transaction raises spectrum aggregation concerns, the Commission typically employs a "spectrum screen" that compares the amount of spectrum an

applicant will hold post-transaction with the total amount of spectrum "suitable and available" for mobile services. In the past, the FCC has omitted from that analysis 133 MHz of BRS and EBS spectrum. As the applicants themselves demonstrate, however, this spectrum is clearly both suitable and available for mobile services – and in fact it is *already in use*. Indeed, they assert that control of the BRS/EBS spectrum will enable them to compete even more vigorously in the mobile services market. In short, in order to evaluate this transaction, the Commission must include 133 MHz of BRS/EBS spectrum in its spectrum screen analysis, in addition to the other blocks of spectrum that are currently included in the screen.

The Commission recently re-affirmed that it will include all available spectrum when it determines the spectrum input market as part of its review of a spectrum transfer. This policy dates to the Commission's decision to increase the amount of spectrum included in the screen when it approved Sprint's original investment in Clearwire in 2008.² In September 2012, the Commission began a proceeding to re-examine its current framework for evaluating mobile spectrum holdings, but it made clear that, "[d]uring the pendency of this proceeding, the Commission will continue to apply its current case-by-case approach to evaluate mobile spectrum holdings during our consideration of secondary market transactions and initial

¹ When it adopted the spectrum screen, the Commission decided that it should include all spectrum that is "suitable" and "available" for the "mobile telephony/broadband services" product market. *See Policies Regarding Mobile Spectrum Holdings*, WT Docket No. 12-269, Notice of Proposed Rulemaking, 27 FCC Rcd 11710, 11721-22 ¶¶ 24-26 ("*Mobile Spectrum Holdings NPRM*"). "Suitability" is determined by "whether the spectrum is capable of supporting mobile service given its physical properties and the state of equipment technology, whether the spectrum is licensed with a mobile allocation and corresponding service rules, and whether the spectrum is committed to another use that effectively precludes its use for the relevant mobile service." *Id.* at 11722 ¶ 26. Spectrum is "available" if it is "fairly certain that it will meet the criteria for suitable spectrum in the near term." *Id.*

² Sprint Nextel Corporation and Clearwire Corporation, Applications for Consent to Transfer Control of Licenses, Leases, and Authorizations, WT Docket No. 08-94, Memorandum Opinion and Order, 23 FCC Rcd 17570 (2008).

spectrum licensing after auctions."³ It reiterated that policy just two months ago in approving a transfer of Wireless Communications Service ("WCS") spectrum:

In the *Mobile Spectrum Holdings NPRM*, we noted, though, that during the pendency of the rulemaking proceeding, we would continue to apply our current case-by-case approach to evaluate mobile spectrum holdings in secondary market transactions and initial spectrum licensing after auctions. Historically, as part of this case-by-case approach in transactions, we consider whether to modify the spectrum screen.⁴

In that same order, the Commission added 20 MHz of WCS spectrum in the 2.3 GHz band, the subject of that transaction, to the spectrum screen. In doing so, the FCC found that 20 MHz of WCS spectrum is "suitable and available for the provision of mobile telephony/broadband services" and "should therefore be added to the spectrum screen."

The Commission should follow suit in this transaction, which involves Clearwire and its significant BRS/EBS holdings, by adding the remaining BRS/EBS spectrum to the screen. As discussed below, the case for adding the 2.5 GHz BRS/EBS spectrum is even more compelling than adding the 2.3 GHz WCS spectrum, because the BRS/EBS spectrum is *already* in use for mobile services, and because the Applicants themselves point to that use as justification for approving their transaction. Indeed, failure to add the BRS/EBS spectrum would arbitrarily depart from the rationale of a Commission order that is less than two months old.

 $^{^3}$ See Mobile Spectrum Holdings NPRM, 27 FCC Rcd at 11718 ¶ 16 n.59.

⁴ See Applications of AT&T Mobility Spectrum LLC, New Cingular Wireless PCS, LLC, Comcast Corporation, Horizon Wi-Com, LLC, NextWave Wireless, Inc., and San Diego Gas & Electric Company, Memorandum Opinion and Order, WT Dkt. No. 12-240, FCC 12-156, ¶ 31 (rel. Dec. 18, 2012) ("WCS Order"). See also Service Rules for Advanced Wireless Services in the 2000-2020 MHz and 2180-2200 MHz Bands, Report and Order and Order of Proposed Modification, WT Dkt. No. 12-70, FCC 12-151, ¶ 243 (rel. Dec. 17, 2012) ("During the pendency of the Mobile Spectrum Holdings Policies proceeding, we will continue to apply our case-by-case approach to secondary market transactions and initial license applications as necessary.").

⁵ WCS Order at ¶ 31.

Sprint's announcement that it will acquire full ownership of Clearwire demonstrates that Clearwire's spectrum – including its leased EBS spectrum – is fully suitable and available for mobile broadband. As Sprint explained to the public, "Clearwire's spectrum, when combined with Sprint's, will provide Sprint with an enhanced spectrum portfolio that will strengthen its position and increase competitiveness in the U.S. wireless industry. Sprint's Network Vision architecture should allow for better strategic alignment and *the full utilization and integration of Clearwire's complementary 2.5 GHz spectrum assets*" In Sprint's and SoftBank's recent amendment to their pending application to transfer control of Sprint and Clearwire to Softbank, they reiterated this position:

With the enhanced capital position, expertise and best practices provided by SoftBank, Sprint will be able to use Clearwire's 2.5 GHz spectrum more effectively as a result of the Clearwire Transaction. Indeed the value and utility of Clearwire's 2.5 GHz spectrum for competitive wireless broadband services is best achieved by combining it with Sprint's complementary core coverage at 1.9 GHz and enhanced geographic coverage with 800 MHz spectrum holdings. Post-transaction, Sprint will be in a position to offer a more robust, higher-capacity mobile broadband network that can compete more effectively in the market place, particularly with the broadband services provided by AT&T and Verizon. Consumers will benefit from the resulting increase in competition and innovation.⁷

Sprint's and SoftBank's stated public interest justification for their pending transaction underscores why the Commission must include the EBS and remaining BRS spectrum in its analysis of the spectrum aggregation that would result from this transaction.

-

⁶ News Release, Sprint Nextel, *Sprint to Acquire 100 Percent Ownership of Clearwire for \$2.97 per Share* (Dec. 17, 2012) (emphasis added), http://newsroom.sprint.com/ article_display.cfm?article_id=2477; see also id. (quoting Sprint CEO Dan Hesse as saying that "[t]oday's transaction marks yet another significant step in Sprint's improved competitive position and ... Sprint is uniquely positioned to maximize the value of Clearwire's spectrum and efficiently deploy it to increase Sprint's network capacity").

⁷ Applications of Sprint Nextel Corporation, Transferor, and SOFTBANK CORP. and Starburst II, Inc., Transferees, for Consent to Transfer of Control of Licenses and Authorizations, Amendment, IB Docket No. 12-343, at 6 (filed Dec. 20, 2012) (citation omitted).

Numerous analysts have echoed the Applicants' justification for the transaction, further underscoring why the EBS/BRS spectrum belongs in any competitive analysis of spectrum holdings. As one analyst concluded, "Gaining full access to Clearwire's almost 140 MHz of nationwide spectrum provides significant bandwidth opportunities" and "solves [Sprint's] spectrum shortage." Other analysts agree, concluding that "Clearwire's spectrum will serve as the foundation" for Sprint launching a robust LTE network, that "Sprint needed additional spectrum for its 4G capacity to meet projected demands," and that Clearwire's spectrum "will work very well for adding capacity in the densest markets."

Clearwire's current use of the BRS and EBS spectrum similarly supplies ample reason to add the BRS/EBS spectrum to the screen. Clearwire became the first company to deploy a 4G network using WiMAX technology in 2009, 11 and since then has aggressively deployed 4G in markets across the country. Today, Clearwire's 4G network covers over 130 million people in approximately 80 markets. 12 These deployments leveraged Clearwire's licensed BRS and leased BRS and EBS holdings across the 2.5 GHz band – what Clearwire itself describes as "approximately 140 MHz of spectrum on average across [its] national spectrum footprint and approximately 160 MHz of spectrum on average in the 100 largest markets," deployments that

Q

⁸ Baird Equity Research, Sprint Nextel Corporation: One More Deal for 2012, 1-2 (Dec. 18, 2012).

⁹ Credit Suisse, Sprint: Buying the Rest of Clearwire at an Attractive Price, 4 (Dec. 17, 2012).

¹⁰ PiperJaffray, Sprint Nextel Corp.: Sprint to Acquire Clearwire, 1 (Dec. 17, 2012).

¹¹ See Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services, Fourteenth Report, 25 FCC Rcd 11407 at 11485 ¶ 117 (2010) (noting that Clearwire launched commercial 4G mobile WiMAX service in Portland, Oregon in January 2009).

¹² See Clearwire, Our Network, http://www.clearwire.com/company/our-network (last visited Jan. 28, 2013).

"enable[] [it] to offer [its] subscribers significant mobile data bandwidth." By its own account, Clearwire has deployed "a capacity-rich 4G mobile broadband network" that "relies upon BRS licenses and excess capacity leases from other BRS and EBS licensees." The Commission, moreover, has recognized that Clearwire is using its substantial BRS/EBS spectrum holdings to provide mobile broadband. 15

This amount of spectrum, of course, is far more spectrum than the 55 MHz of BRS spectrum currently included in the screen, and its use demonstrates that the BRS/EBS band is "capable of supporting mobile services." It is thus arbitrary for the Commission to include only 55 MHz of BRS spectrum in the screen and exempt the remaining BRS/EBS spectrum. Virtually all of the 194 MHz of BRS/EBS spectrum – not merely the 55 MHz that is currently included – is both suitable and available for use to provide mobile services, and thus meets the Commission's criteria for inclusion.

The use of BRS/EBS spectrum has materially changed since the Commission last analyzed whether to include EBS spectrum in the screen in 2008. At that time, the transition of

¹³ Clearwire Corp. Form 10-K, at 14 (Feb. 16, 2012) (for period ending Dec. 31, 2011).

¹⁴ Comments of Clearwire Corporation, *Globalstar, Inc. Petition for Rulemaking to Reform the Commission's Regulatory Framework for Terrestrial Use of the Big LEO MSS Band*, RM-11685, at 7 (filed Jan. 14, 2013) ("Clearwire Comments RM-11685").

¹⁵ See Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services, Fifteenth Report, 26 FCC Rcd 9664, 9739 ¶ 113, 9824 ¶ 273, 9830 ¶ 287 (2011) ("Fifteenth Report").

¹⁶ The BRS/EBS band clearly has a mobile allocation and corresponding service rules. See Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems, First Report and Order and Memorandum Opinion and Order, 16 FCC Rcd 17222 (2001); Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 14165, 14169 (2004) ("BRS/EBS R&O and FNPRM") (subsequent history omitted).

the 2.5 GHz BRS/EBS band to a mobile broadband band plan was only 68 percent complete.¹⁷ Today, the transition is complete in more than 98 percent of the markets across the country, making the spectrum suitable and available in the vast majority of the nation.¹⁸

Further, time has proven that the educational purpose of the EBS spectrum and related restrictions – the five percent capacity reservation ¹⁹ – do not preclude the use of EBS spectrum for mobile services. To the contrary, as noted above, Clearwire is using EBS spectrum for mobile services, and the five percent reservation may be met by providing capacity on the mobile broadband network. Other characteristics of the EBS spectrum similarly do not limit its use for mobile services. For example, long-term EBS leases often extend far longer than the right to use spectrum in other bands, which can be limited to ten- or fifteen-year license terms. Further, the site-based character of EBS licensing and associated white spaces is not a reasonable basis to exclude the spectrum, ²⁰ as the Commission already includes other types of spectrum in the screen that are site-based with white space gaps, *e.g.*, cellular spectrum. ²¹

_

¹⁷ See Sprint Nextel Corporation and Clearwire Corporation, Memorandum Opinion and Order, 23 FCC Rcd 17570 at 17597-98 ¶ 66 (2008) ("Sprint Nextel-Clearwire Order") (noting that the transition had been completed in 337 out of 493 Basic Trading Areas). Indeed, when the Commission first decided to exclude EBS from the spectrum screen it noted that the transition of 2.5 GHz spectrum to a mobile broadband band plan was in its infancy. See id. at 17597 ¶ 65 (citing Nextel Communications, Inc. and Sprint Corporation, Memorandum Opinion and Order, 20 FCC Rcd 13967 at 14022 n.338 (2005)).

¹⁸ FCC, Universal Licensing System, License Search (last viewed Jan. 3, 2013); FCC Electronic Comment Filing System, WT Docket No. 06-136 (last viewed Dec. 28, 2012).

¹⁹ 47 C.F.R. § 27.1214(b)(1).

²⁰ Sprint Nextel-Clearwire Order, 23 FCC Rcd at 17599 ¶ 71.

²¹ Commission is also considering a range of proposals for rapidly licensing these EBS white spaces. *See Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands,* Third Order on Reconsideration and Sixth Memorandum Opinion and Order and Fourth Memorandum Opinion and Order and Second Further Notice of Proposed Rulemaking and Declaratory Ruling, 23 FCC Rcd 5992 at 6060-68 ¶¶ 181-204 (2008).

In any event, there is no basis to treat spectrum leased from EBS licensees and used for commercial mobile services differently from any other spectrum used for commercial mobile services. The Commission's spectrum leasing policies state that general competition principles, including assessment of potential competitive effects of transactions, apply to leased spectrum. And when the Commission extended its secondary markets leasing policy to BRS/EBS spectrum, it explained that doing so would allow for "more efficient and dynamic use of the important spectrum resource to the ultimate benefit of consumers throughout the country." Thus, the fact that wireless providers make use of EBS spectrum via lease arrangements does not render the spectrum either unsuitable or unavailable. With the exception of five percent of EBS spectrum reserved for educational use, and none of the EBS spectrum is "committed to another use" and, in light of commercial providers' significant use of the EBS spectrum, the Commission should include the 95 percent of EBS spectrum available for commercial mobile use in the screen.

With these developments, the entire BRS/EBS spectrum band is suitable and available for commercial mobile use and should be included in the spectrum screen. In precise terms, and as detailed in the chart below, the Commission should add 132.625 MHz of BRS/EBS spectrum – the remaining 21 MHz of BRS spectrum that is not currently included in the screen plus 111.625 MHz of EBS spectrum (the 95 percent of EBS spectrum that is available for commercial mobile

²

²² Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 20604, 20657 \P 119, 20667 \P 147 (2003) (applied to spectrum manager and long term *de facto* leases).

 $^{^{23}}$ BRS/EBS R&O and FNPRM, 19 FCC Rcd at 14233 ¶ 179.

²⁴ See 47 C.F.R. § 27.1214(b)(1).

use).²⁵ Together with the 55.5 MHz of BRS already included in the screen, therefore, the Commission should consider a total of 188.125 MHz as suitable and available for mobile use and, thus, included in the screen.

Additional BRS/EBS Spectrum to be Included in the Spectrum Screen

Band	BRS MHz to	EBS	95% of EBS	Total to Include
	Include in Screen	MHz	to Include in Screen	in Screen
Lower Band Segment				
BRS Channel 1	6	0	0	6
LBS EBS	0	66	62.7	62.7
Middle Band Segment				
MBS BRS	12	0	0	12
MBS EBS	0	30	28.5	28.5
Guard Bands				
J Guard Band	0	4	3.8	3.8
K Guard Band	3	1	0.95	3.95
Upper Band Segment				
UBS EBS	0	16.5	15.675	15.675
Total				
	21	117.5	111.625	132.625

Each of these specific spectrum blocks is properly included in the screen for the reasons below:

• <u>BRS Channel 1 – 6 MHz.</u> Initially, the FCC did not include BRS Channel 1 because it was adjacent to EBS spectrum and not contiguous to other BRS spectrum.²⁶ Neither justification warrants continued exclusion today. First, Clearwire uses BRS Channel 1 to provide mobile services to millions of Americans.²⁷ As Clearwire recently observed, it has assembled BRS-1 spectrum across much of the country, and "[t]his ability of BRS-1 to accommodate common, near-nationwide operations on a

²⁵ See id. (requiring an EBS licensee to reserve a minimum of 5% of the capacity of its channel for educational use, making 95% of the capacity of the EBS spectrum available for commercial mobile services).

²⁶ See Sprint Nextel-Clearwire Order, 23 FCC Rcd at 17598 ¶ 68.

²⁷ See Letter from Cathleen A. Massey, Clearwire Corp., to Marlene H. Dortch, FCC, WT Docket No. 03-66, RM-11614, Attachment at 3, 4 (filed Oct. 19, 2012) ("CLWR currently operates WiMAX and pre-WiMAX technologies in the 2496-2500 band.").

single frequency represents an especially valuable asset."²⁸ In addition, as noted above, there is no reason to exclude EBS spectrum and thus the lack of contiguity with BRS is a non-issue. And, the fact that Clearwire successfully uses BRS Channel 1 to provide these services negates any claim that the screen should exclude BRS Channel 1 because the 2496-2500 MHz band is shared with MSS, BAS and fixed microwave licensees. BRS Channel 1 is clearly suitable and available and it should be included in the screen.

- <u>Lower Band EBS 62.7 MHz.</u> The Commission should include 95 percent of the 66 MHz of Lower Band Segment EBS spectrum, *i.e.*, 62.7 MHz. As noted above, with the exception of the 5 percent that is reserved for educational use, EBS spectrum is used in commercial mobile broadband networks and should be deemed suitable and available and included in the screen.
- Middle Band BRS 12 MHz. In 2008, the Commission observed that "[a]t this time, we lack a sufficient record to determine the extent to which MBS is in fact available for mobile telephony/broadband services." Yet the Commission also recognized, "nothing in our service rules precludes the potential use of the MBS channels for mobile telephony/broadband services." Now, with years of experience under the new band plan, it is apparent that only a relatively few high-powered video systems remain in the Middle Band Segment. Thus, there is no basis to justify a broad assumption that the Middle Band Segment should be excluded from the screen. Moreover, such an approach would be inconsistent with overall spectrum screen policy, as other bands that can be used for high powered broadcasts (*i.e.*, Lower 700 MHz C, D, and E Block spectrum) are included in the screen. The 12 MHz of Middle Band Segment BRS spectrum should be added to the screen.
- Middle Band EBS 28.5 MHz. For the reasons stated above with regard to EBS spectrum suitability and availability, as well as the unhindered mobile broadband access to the Middle Band Segment, the Commission should add 95 percent of the 30 MHz of Middle Band Segment EBS spectrum, *i.e.*, 28.5 MHz, to the screen.
- Guard Band 7.75 MHz. Although the BRS/EBS guard band channels are secondary to high-powered video systems in the Middle Band Segment, the diminishing number of such high powered systems nationwide has made these channels far more useable. Commercial operators can combine these narrow channels to provide mobile telephony/broadband services. The Commission should add 95 percent of the 4 MHz EBS J guard band, i.e., 3.8 MHz; 95 percent of the 1 MHz EBS K guard band, i.e., 0.95 MHz; and the 3 MHz BRS K guard band.

10

²⁸ Clearwire Comments RM-11685 at 10.

²⁹ See Sprint Nextel-Clearwire Order, 23 FCC Rcd at 17598 ¶ 67.

³⁰ *Id*.

• <u>Upper Band EBS – 15.675 MHz.</u> Finally, for the reasons stated above with regard to EBS spectrum suitability and availability, the Commission should include 95 percent of the 16.5 MHz of Upper Band EBS spectrum, *i.e.*, 15.675 MHz, in the screen.

In sum, of the 194 MHz of BRS/EBS spectrum, the Commission should include in the spectrum screen all but the 5 percent of EBS spectrum (5.875 MHz) dedicated for educational use, for a total of 188.125 MHz. Only by doing so can the Commission conduct a proper competitive review of the SoftBank-Sprint-Clearwire transaction that accurately reflects the full amount of spectrum that is suitable and available for wireless providers to compete.

Respectfully s	submitted,
----------------	------------

/s/

Michael E. Glover *Of Counsel*

John T. Scott, III Vice President & Deputy General Counsel Catherine M. Hilke Assistant General Counsel

VERIZON 1300 I Street, NW Suite 400 West Washington, DC 20005 (202) 515-2412

January 28, 2013

Attorneys for Verizon Wireless

Certificate of Service

I hereby certify that on this 28th day of January copies of the foregoing "Comments of Verizon Wireless" in WT Docket 12-343 were sent by electronic mail to the following parties:

Best Copy and Printing, Inc. FCC duplicating contractor FCC@BCPIWEB.COM

Kathleen Collins International Bureau Kathleen.Collins@fcc.gov

David Krech
International Bureau
David.Krech@fcc.gov

Paul Murray Wireless Telecommunications Bureau Paul.Murray@fcc.gov

Aaron Goldschmidt
Wireless Telecommunications Bureau
Aaron.Goldschmidt@fcc.gov

Christopher Sova Wireline Competition Bureau Christopher.Sova@fcc.gov

Wayne McKee Media Bureau Wayne.McKee@fcc.gov

Neil Dellar Office of General Counsel <u>TransactionTeam@fcc.gov</u> Howard J. Symons Counsel for Clearwire Corporation HJSymons@mintz.com

Regina M. Keeney

Counsel for Sprint

gkeeney@lawlermetzger.com

John R. Feore
Counsel for Softbank Corp. and Starburst I,
Inc. and Starburst II, Inc.
jfeore@dowlohnes.com

		1
/	C	/